

Supreme Court, U.S.

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In The

Supreme Court of the United States

October Term, 1922.

212
No. 826.

WILLIAM LUCKING,

Plaintiff and Appellant,

v.

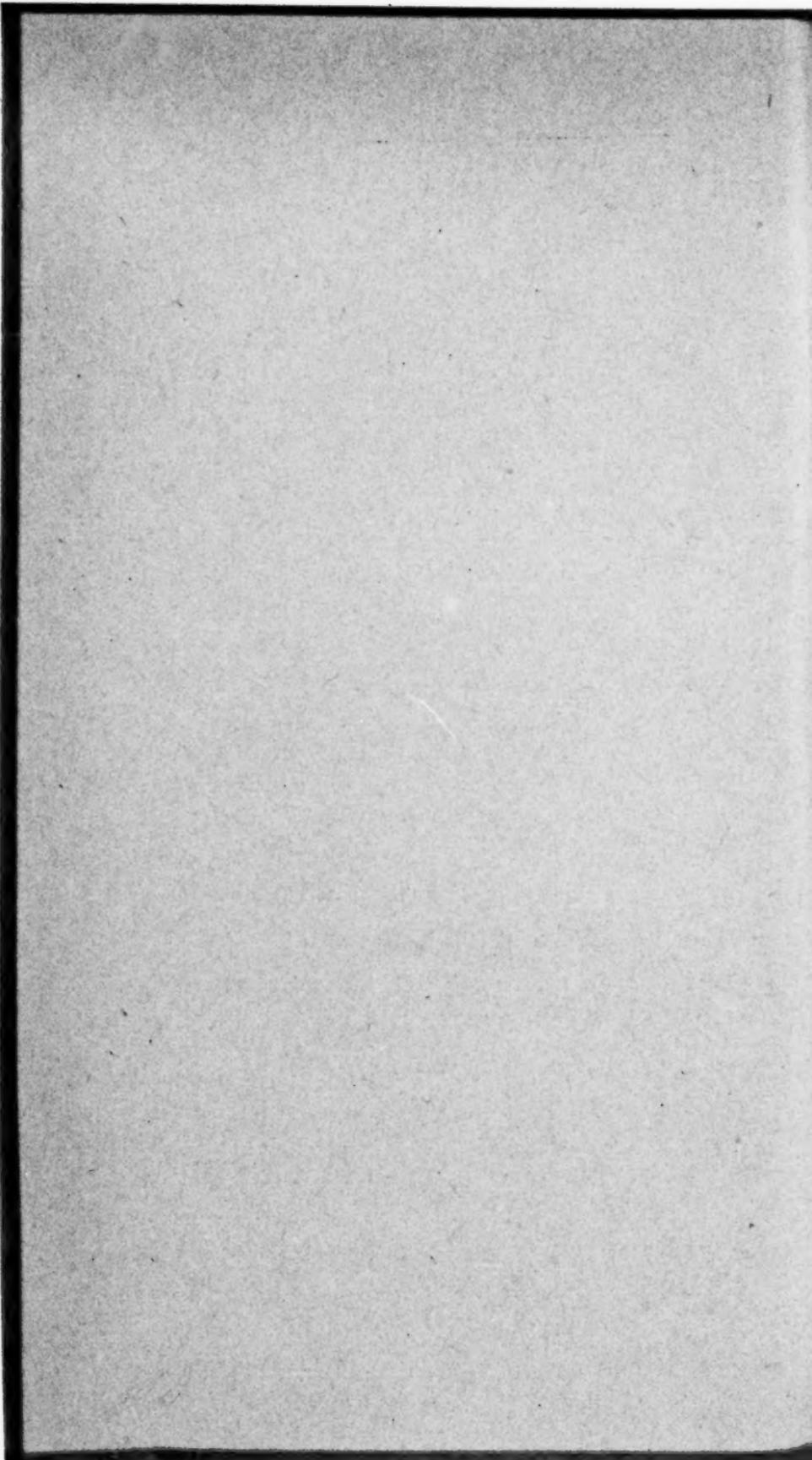
DETROIT & CLEVELAND NAVIGATION COMPANY,

Defendant and Appellee.

BRIEF FOR APPELLANT.

WILLIAM LUCKING,

Plaintiff and Appellant.



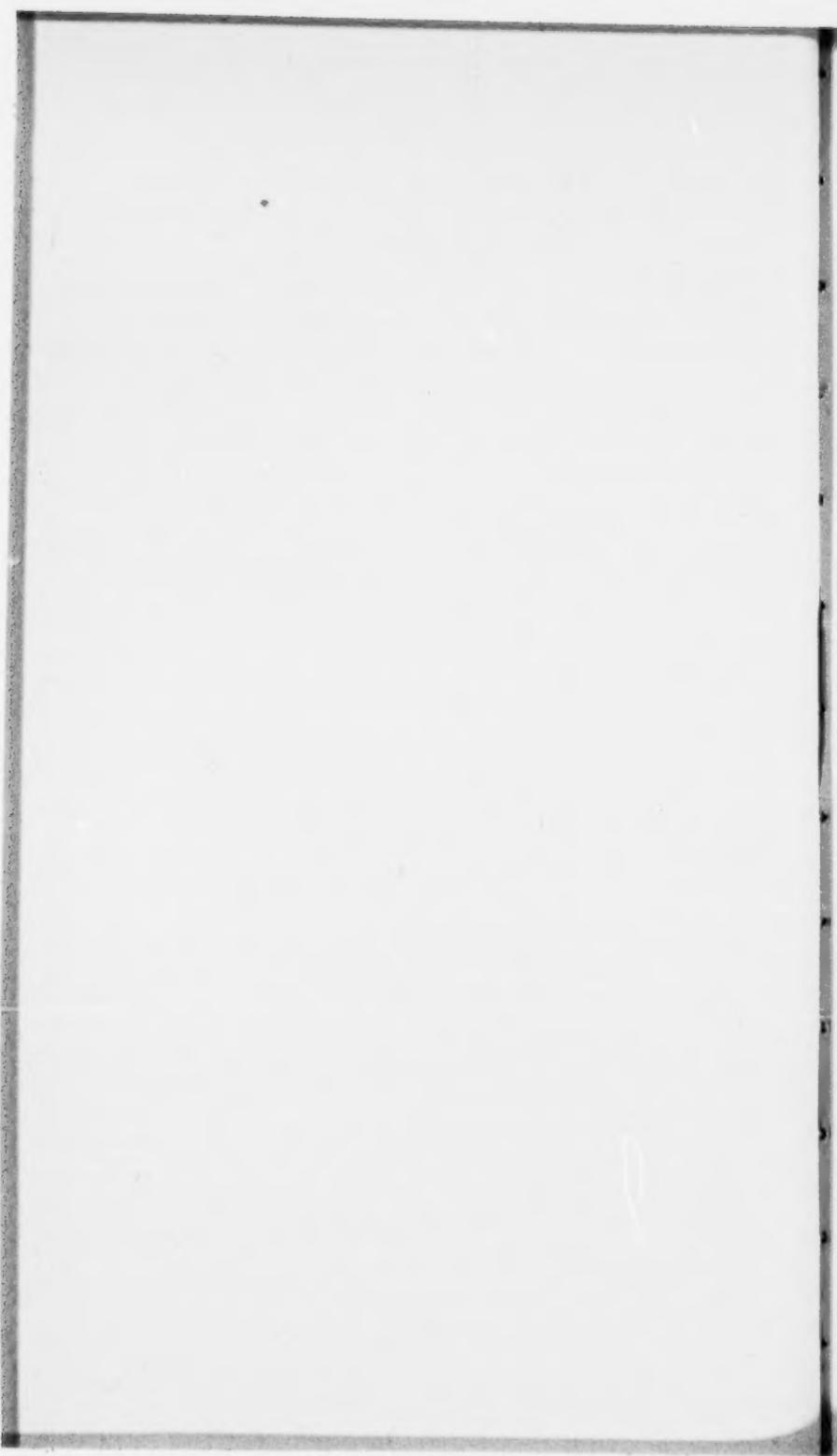
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DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

BRIEF FOR APPELLANT.

The lower courts dismissed the bill of complaint filed to enjoin defendant from discontinuing its boat service of thirty years' standing over its well known Detroit to Mackinac Island Route.

Defendant, by its motion to dismiss, admits that it has the facilities with which to perform this service—that it is a common carrier—that this service is necessary to the public and the different ports on Lake Huron—and that it performs this service at a profit.

Defendant, however, took the position, in effect, in the lower courts that, being a carrier by water, it owed no duty to the public whatever—and could, in a word, operate its vessels over a given water route for thirty years, performing regularly a necessary transportation service for whole towns and communities and then suddenly abandon this route.

Its regular steamers, *City of Alpena II* and *City of Mackinac II*, were tied to the docks in Detroit and this territory has since been without this necessary transportation service.

The District Court sustained defendant in its contention (R., 11-18), opinion 273 *Fed.*, 577, and plaintiff appealed to the Court of Appeals for the Sixth Circuit, which affirmed the decree of the District Court. For its opinion, see 284 *Fed.*, 497, and record pages 19 to 25.

THE FACTS.

The averments of the bill being taken as true on a motion to dismiss, it is therefore admitted:

(a) That the defendant is a common carrier for hire and engaged in both interstate and intrastate transportation of passengers and property on the Great Lakes.

That it has carried on such business for thirty years or more over well known and defined routes between Detroit and Buffalo, Detroit and Cleveland, and Toledo, Ohio and Detroit, Michigan to Mackinac Island and St. Ignace. (Bill of complaint, Par. 3).

(b) That it is a common carrier, partly by railroad and partly by water, being engaged in the continuous interstate transportation of freight and passengers from points on different railroads to and from points on its routes.

That defendant intends to and will carry on its general business as a common carrier during the season of 1921 and thereafter and will derive a large profit from such business (Pars. 4, 5).

(c) That its Detroit to Mackinac Island Route is one of the most popular and largely traveled routes on the Great Lakes. That it has maintained for years over this route a regular four trip per week service by its steamers, Alpena II and Mackinac II, and has carried over this route tens of thousands of passengers and hundreds of thousands of tons of freight (Par. 6).

(d) That it has made large profits on its capital invested in this business and has availed itself of the many costly harbor improvements maintained by the United States.

That in 1919 its profits on its business equalled 25% after all Federal and other taxes had been paid.

That defendant has made a large net profit in the past on its business over its Detroit to Mackinac Route (Par. 7).

(e) That many of the ports and cities of Lake Huron were developed and built up in part by, and depend upon this transportation service of defendant, and that large amounts of the products of these ports and cities on Lake Huron are carried regularly on its steamers (Par. 8).

(f) That plaintiff has been a passenger and shipper of goods in the past and intends to use said boats in the future (Par. 9).

(g) That defendant is discontinuing said Detroit to Mackinac service because of dissatisfaction with the Seamen's Act and intends to abandon this route and leave the territory served by its steamers without such transportation facilities (Par. 10).

(h) That the bill of complaint is filed on behalf of all other persons who may desire to intervene (Par. 14).

The prayer of the bill is that the defendant be compelled by this court to operate its steamers Alpena II and Mackinac II on said Detroit to Mackinac Route as has been its custom and usage in the past, and with rates and charges upon a reasonable and fair basis.

Upon the hearing on appeal, the cities of Alpena, Har-

bor Beach and Cheboygan, obtained permission to appear and be heard on briefs in support of the bill of complaint.

It is to be noted that no service is asked of this defendant which it has not given for the last twenty or thirty years to this territory.

That no request is made for additional facilities or expenditures of money for additional boats or equipment of any kind.

The lower court was asked to compel defendant to operate its steamers as usual and to not permit it to arbitrarily and without reason deprive this territory of the transportation facilities upon which it depends and upon which it was built up in the past.

And the bill avers that defendant could perform this service and does perform it at a profit, and that its entire business brings it in a large and handsome return on its investment.

QUESTIONS PRESENTED.

The case presents a question of great public importance involving as it does the right of the general public to have maintained a necessary and very important carrier service by water.

It involves the question whether obligations and duties held by this court applicable to common carriers generally, are to be applied to common carriers by water or whether such carriers are in a class by themselves and thus relieved from performance of the usual duties of a carrier to the public.

The plaintiff, and the intervening cities on Lake Huron, contended that since the defendant had for over thirty years operated its vessels over a well established route upon Lake Huron and under regular schedules.

And since by such regular service communities had been built up and a public necessity for such service created.

And since defendant's general business returned it a handsome profit, which it continued to derive from its regular routes upon Lake Erie from Detroit to Cleveland and Detroit to Buffalo.

That it could not arbitrarily abandon its established route from Detroit to Mackinac Island and all service thereon, which was necessary to the public and for which it had adequate facilities.

It is submitted that the question presented is one of

vital importance to the public, not only of Michigan and surrounding territory, but also of the country at large.

It presents to this court the question whether common carriers by water are to be held to the same duties and obligations as those pertaining to other common carriers, such as railroads.

Judge Knappen, in delivering the opinion of the Court of Appeals, said:

"It is undisputed that defendant was incorporated under the general Michigan Statute of 1867, which authorized such incorporation 'for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith.' * * * Defendant's articles of incorporation, which constitute its charter, contain no designation or mention of the route or routes over which navigation was intended, nor did either of such incorporation statutes require such designation. Defendant is indisputably a common carrier by water, and as such is engaged in domestic and interstate commerce, and has been so engaged for more than 20 years. Being engaged in the operation of a public utility, it was and is subject to an enforceable obligation (and, we assume, even in the absence of statute or special contract, by franchise or otherwise) to supply on demand reasonable service in the transportation of passengers and freight over such lines as are at the time operated by it. No question of reasonableness of service as to any route under operation by defendant when this suit was instituted is here presented. The sole question before us is whether, either by common law or by statute (federal or state) defendant is forbidden to cease or suspend navigation over a given route over

which it has previously operated—because such cessation entails inconvenience or hardship upon the public previously served by such utility" (R., 22).

A determination of the case involves consideration of three questions, namely:

(1st) Whether defendant is within the terms of the Interstate Commerce Act and Amendments and what if any duties to serve the public are imposed upon it thereby.

(2nd) Whether defendant is under any duty at common law to maintain a necessary service over an established route.

(3rd) Whether defendant is under such duty by virtue of any of the statutes of the state of Michigan.

ARGUMENT.

POINT I.

This Court May Grant Plaintiff Full Relief—Whether the Right Thereto is Based Upon the Provisions of the Interstate Commerce Act or Upon the Common Law Right to Compel a Carrier to Perform Its Duties, or Upon a Statute of Michigan.

Greene v. Railroad Company, 244 U. S., 499.
Siler v. Louisville, Etc. R. R. Co., 213 U. S., 175, 191.
Ohio Tax Cases, 232 U. S., 576, 586.

POINT II.

A Common Carrier By Water is Charged With the Same Obligations and Duties as Any Other Carrier.

The Maggie Hammond, 9 Wall., 435, 460.

The Lady Pike, 21 Wall., 1, 14.

The Niagara v. Cordes, 21 How., 7, 23.

Citizens Bank v. Nantucket Steamboat Co., 2 Story, 16, *Federal Cases No. 2730.*

POINT III.

The Defendant is a Common Carrier, Partly by Railroad and Partly by Water, Within the Meaning of the Interstate Commerce Act, and is as Specifically Within the Terms of That Act as Any Other Carrier Named Therein.

Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194, 207.

In *Interstate Commerce Commission v. Goodrich Transit Company*, *supra*, Mr. Justice White in delivering the opinion of this court said:

“The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrange-

ment for a continuous carriage or shipment. It is conceded that the carriers filing the bills in those cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier, named therein."

It is of interest that in the *Goodrich case, supra*, counsel's contention that vessel companies were not subject to the act for any purpose (see pages 199 and 202) was disposed of by this court at bottom of page 207 of its opinion.

The provisions of the Interstate Commerce Act apply to many different kinds of common carriers.

Pipe line companies are within the act.

The Pipe Line Cases, 234 U. S., 548.

Telephone and telegraph companies are within the act.

Stevens v. Telephone Co., 240 Fed., 759.

To terminal companies, even though they are wholly within one state.

United States v. Union Stockyard, 226 U. S., 286.
Penn. Co. v. United States, 236 U. S., 351.

To steamship companies, which participate in continuous shipment of freight by arrangements with railroads.

Interstate Commerce Commission v. Transit Company, supra.

Alaska Steamship Co. v. Assn., 236 Fed., 964.

POINT IV.

That the Defendant Steamship Company is Clearly Within the Terms of the Interstate Commerce Act is Shown by the Different Amendments to the Act.

The present act provides:

“(1) That the provisions of this act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * *

(3) * * * Wherever the word ‘carrier’ is used in this act it shall be held to mean ‘common carriers’ * * * the term ‘transportation’ as used in this act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage.”

Interstate Commerce Act, as amended by the Act of February 28, 1920.

Section 3, *supra*, was amended recently so as to include the term “vessels.”

The word “transportation” is of importance in construing the act.

Penn. Co. v. U. S., 236 U. S., 351, 363.

Section 4 of the Interstate Commerce Act provides that:

* * * “(4) It shall be the duty of every com-

mon carrier subject to this act engaged in the *transportation of passengers or other property* to provide and furnish such *transportation upon reasonable request therefor.*"

These provisions of the act apply to a coast wise steamship company or lake carrier within the United States and compel it to furnish adequate facilities for transportation of passengers and freight.

Alaska Steamship Company v. Longshoremen's Association, 236 Fed., 964, 971.

The Interstate Commerce Act was originally directed entirely against practices of discrimination.

Act of February 4, 1887 (24 U. S. Stats., 379).

Then by amendment of June 29, 1906, a provision directing rendition of transportation service upon reasonable request was added—see:

34 Stats., 584, Sec. 1 end of 2nd Paragraph.

This provision has been commented on by this court in:

Chicago Ry. v. Elevator Co., 226 U. S., 426, 434.
Ellis v. I. C. C., 237 U. S., 434, 443 (first syl.).

Thereafter this provision was rearranged as Subdivision 4 of Section 1 of this act. See 41 Stats., 474, amendment of February 28, 1920.

The provisions of the Interstate Commerce Act do not apply, however, to ocean carriers transporting goods to foreign countries.

Pacific Steamship Co. v. Railroad Co., 251 Fed., 218 (9 C. C. A.).

POINT V.**Common Carriers Are Often Compelled to Operate Branch Lines Where the Public Necessity Therefor Appears.**

The bill avers that this necessary service can be rendered without loss and this, of course, is taken as true. It also avers that the defendant is making large returns on its capital and several times what is earned by an ordinary carrier by railroad.

But even though some slight loss was made on this Mackinac Route, since defendant admits that on all its business it makes a considerable profit, it has no legal right to abandon this service, for the public necessity therefor is also admitted.

Chesapeake & Ohio Railroad Co. v. Commission,
242 U. S., 603, 607.
Atlantic Coast Line v. Commission, 206 U. S., 1-24.

In *Chesapeake & Ohio Co. v. Commission, supra*, an order requiring the railroad company to run two passenger trains each day upon a branch on which no passenger service had ever been had, although such trains would be run at a loss, was sustained.

The Supreme Court in laying down the rule to be followed in all cases said:

“One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment

of the powers and privileges granted by the state and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co. v. North Carolina Corporation Commission*, 206 U. S., 1, 26; *Missouri, Pacific Ry. Co. v. Kansas*, 216 U. S., 262, 279; *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S., 510, 529; *Chicago, Burlington & Quincy R. R. Co. v. Wisconsin Railroad Commission*, 237 U. S., 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered are also to be considered. Cases *supra*. Applying these criteria to the order in question, we think it is not shown to be unreasonable."

And see:

Colorado Co. v. Commission, 54 Colo., 64; 129 Pac., 506.
State. v. R. R. Co., 53 Kan., 377; 36 Pac., 747.
Southern Company v. Franklin Co., 96 Va., 693; 32 S. E., 485.
People v. Albany R. Co., 24 N. Y., 261.
Southern R. R. Co. v. Hatchett, 174 Ky., 463; L. R. A. 1917-D, 1105.

Defendant having been incorporated as a common carrier by the state of Michigan—with power to own and hold property for that purpose—and

Having exercised its corporate powers and privileges to that end for a great number of years, and having operated its steamers over its Detroit to Mackinac Route for over thirty years, and

Now continuing to exercise its corporate franchises on its Detroit to Cleveland and Detroit to Buffalo Routes, we submit:

It cannot arbitrarily abandon its customary service on the Mackinac Route and thus avoid its implied duty to the public, and for which there is a public necessity.

It is of no consequence that defendant's charter is what is sometimes referred to as "permissive" and does not contain express stipulations in so many words requiring operation of its steamers on this Mackinac Route.

Common carriers must operate branch lines, where public necessity requires, *even though there is no statute or charter provision*—the route having been laid out voluntarily by the carrier and the service given for a long period of years.

Gasser v. Railroad Company, 205 Mich., 5.

In *Gasser v. Railroad Company, supra*, it was held by the Supreme Court of Michigan, that a railroad company, having been incorporated as a common carrier, and having entered upon the operation of its line under the implied duty to the public to continue its operation as a public service corporation, could not, thereafter, arbitrarily abandon operations, permanently discontinue the assumed service, and dismantle the road without the consent of the state through its constituted authority.

The court in its opinion by Mr. Justice Steere, said:

"It is urged in behalf of the people of Garden township that because the township granted a franchise as described in the court's findings to the lumber company which constructed the road, the defendant railway company as assignee, is thereby obligated to continue its operation during the franchise period. The conclusions of the trial court in rejecting this contention are supported in facts by the

record and the reasons therefor well stated as follows:

'There is no language in the franchise from which an undertaking on the part of the grantees thereof to construct or to operate such railroad can be found expressly or by implication. In the construction of the road, no right or privilege granted by the franchise was exercised. Except where it crosses certain highways, the road was not laid on or in any highways, streets, alley or public place of Garden township, and the highway crossings were not, it is claimed, made under the terms of the franchise but under arrangements between the lumber company and the township outside the franchise.'

The Garden Bay Railway Co. having been incorporated under the laws of the state as a common carrier, secured permission from the railroad commission to issue stock and entered upon the operation of its line under the *implied duty to the public to continue its operation as a public service corporation*. It could not, thereafter, in less than 18 months after its last hearing before the commission relative to its stock issue, arbitrarily abandon operations, permanently, discontinue the assumed service and dismantle the road *without the consent of the state through its constituted authority*.

We need not review the many authorities cited or discuss the arguments represented by counsel on the varying phases of that subject, for the law is well recognized that the state can and generally will, when possible, enforce the continuous exercise of such granted corporate powers for public service and benefit, even though unprofitable or at a loss to the corporation, except under special circumstances where peculiarly equitable considerations justly warrant permitting abandonment."

And see:

Grinsfelder v. Spokane Ry. Co., 19 Wash., 518; 41 L. R. A., 515.

Hocking Valley Co. v. Commission, 92 Ohio St., 9,
L. R. A. 1918-A, 267.

State v. Bullock, 78 Fla., . . .; 82 So., 866.

Bryan v. L. & N. R. R. Co., 244 Fed., 650, 654.

In *Hocking Valley Company v. Commission*, *supra*, the Supreme Court of Ohio, in its opinion said:

"It is not shown that there is any special franchise provision or any contract by which the defendant expressly agreed to render the service in question. Therefore, the order of the commission must find its validity, if at all, by reason of the fact that the defendant is a public utility, incorporated and organized under the laws of the state, and that, while exercising the rights and privileges accruing to it as such, it has by its acts and conduct created the situation found by the commission to exist; and that from this situation a duty is imposed upon it which it cannot disregard in the absence of such a showing on its part as above indicated. * * *

It is undoubtedly true that the question whether or not the interurban service is a paying service should be considered with respect to its bearing on the question whether the public necessities require such service. The presumption is that where there is such a condition and such demand for the service as to amount to public necessity the rendering of the service would not result in loss. The finding of the commission was that the defendant had not shown that the furnishing of the service will entail loss upon it, and the finding was that the public convenience, welfare, and necessity require the continuance of the service. * * *

We are not constrained to think, however, that this rule should have conclusive effect in connection with the facts showing in this case. Here the public needs were created and grew up in view of the voluntary action of the defendant itself. The finding of the commission is that the public necessity still

exists. *An unusual and abnormal situation was developed under the lead of the defendant. The moving by the people away from central points to places scattered along the line of the defendant, and all of the things pointed out in the testimony and the findings, being done while the people relied upon the continuance of the voluntary service by the defendant, presents a situation which clearly estops it from invoking the rules above stated.*"

In *Bryan v. R. R. Co.*, *supra*, the Eighth Circuit Court of Appeals, said:

"We think it must be conceded that a railroad which has been constructed and operated for 40 years may not be relocated in the manner in which it is shown by the evidence the old line of the South & North was relocated, without legislative authority. *Brown v. Railway Company*, 126 Ga., 248; 55 S. E., 24; 7 *Ann. Cas.*, 1026; *Railway Company v. Kirkland*, 129 Ga., 552; 59 S. E., 220; *Lusby v. Kansas City, Etc. R. Co.*, 73 Miss., 360; 19 *South*, 239, 36 *L. R. A.*, 510. In *Brown v. Railway Co.*, *supra*, it was said: 'It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus a change cannot be made for reasons of convenience or expediency, or economy merely.' A great number of authorities are cited to support this statement of the law. In *L. R. A. 1915-A*, 549, it is said: 'The general rule seems to be that a railroad cannot abandon its road or branch, even though it may be operated at a loss, and cases which are apparently in conflict with this rule, will be found to have turned on special circumstances that warranted the decision.' "

And in *Wyman on Public Service Corporations*, Vol. 1, Sections 305, 306, the author says:

"Sec. 305. System constructed under permissive charter.

Where the charter which has been accepted is permissive merely, permitting the chartered company to construct the system as it has done, the cases are in irreconcilable conflict as to whether after such construction the accepting company is thereafter bound to continue the service or whether it may withdraw from a particular part of its present service. It is now probably the weight of authority that a company which has accepted public franchises cannot retain such of these rights as it pleases it to exercise, and refuse to regard the public interests as a whole. In the most elaborate case to this effect—*State ex rel. v. Spokane Street Railway Company*—the court ordered a resumption of service upon an abandoned branch line. Mr. Justice Reaves, concluding his elaborate opinion thus: 'Such corporations, then, may not, by their own acts, disable themselves from performing the functions, which were the consideration for the public grant. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. And it is not in degree only that these franchises differ from mills and inns. The one is private property, the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations still re-

tains the public use. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.'

Sec. 306. Cases permitting partial withdrawal.

However, there are almost as many cases permitting a partial withdrawal where there is no charter provision making the continuance of every service undertaken requisite. This was the prevailing view until the latter part of the last century; the usual doctrine being simply that when the charter was permissive the continuance of any service was left to the discretion of the company. But of late years the cases permitting withdrawal from a part of the service undertaken have stated considerable qualifications upon this right. This modern law is best summarized in a recent opinion in Virginia by Judge Keith, holding that a railroad might discontinue service upon an unprofitable branch. 'It may be asked, is a corporation having constructed a road to be permitted to abandon its use at its pleasure? We answer that it is not to be apprehended that the corporation will abandon any part of its line, the operation of which is found remunerative in the present, or that is likely to become so in the future. Where the line of railway, taken as a whole, cannot be profitably maintained; where its operation, when discreetly and economically managed, is attended with loss, it is difficult to perceive how a court can, by mandamus or otherwise, compel its operation to be continued. If the loss is the result of improvident and unthrifty management, the court may, at the suit of those interested, take charge of it for the benefit of all concerned, and run it through the instrumentality of a receiver, but if the traffic of the road is really insufficient to support a wise and economical administration of its affairs there would seem to be no escape from its ultimate abandonment. Such cases are possible though rare. *It more frequently happens, however, that a part of the line*

becomes unprofitable, though the system as a whole may be valuable. In such an event the court will inquire, first as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power, it will consider all the circumstances of the case, and if upon the facts it shall appear that the duty unfulfilled inflicts no particular injury or hardship upon those who make the complaint, and that the service which they receive is under all the conditions reasonably adapted to their needs, while the performance of the duty would entail a burden and loss upon the company far in excess of any benefit conferred, and which might in its ultimate effect embarrass or prevent the performance of other duties with respect to larger interests, and affecting a far greater number of citizens, the court will withhold its hands."

No one can be compelled to engage in business as common carrier—but if they do, they become subject to the duties of a common carrier—even though such duty is not imposed by statute or order of commission.

Missouri Pacific Co. v. Larabee Mills, 211 U. S., 612, 619.

This is not a case where the carriers' entire operations and service are at a loss and it seeks to surrender its franchises and go out of business.

Of course, under special circumstances a carrier may abandon operation, as in the cases of:

Bullock v. R. R. Commission, 254 U. S., 513, 521.

Iowa v. Trust Co., 215 Fed., 307 (8 C. C. A.).

State v. Jack, 145 Fed., 281 (4 C. C. A.).

Southern R. R. Co. v. Hatchett, supra.

But carriers by steamboat may not disregard the rights of the public.

Lee Steamers v. Packet Co., 277 Fed., 5, 9 (6 C. A.).

POINT VI.

That Defendant Enjoyed No Right of Eminent Domain From the State of Michigan, Does Not Relieve It From Its Duty to Afford the Public an Admittedly Necessary Transportation Service.

It was urged by counsel for the defendant company in the lower courts, and sustained, that a common carrier by water should not be required to fulfil its duties to the public. In other words, that the defendant carrier by water did not enjoy certain privileges which a carrier by railroad did—such as, for instance, the right of eminent domain—and therefore could not be required to adequately serve the public necessities, etc.

The lower courts' conclusion cannot be sustained, either upon principle or authority, we think, for

The charters of railroad companies do not generally purport to define every route or branch line it will operate from time to time; but

After a railroad company has operated for a length of time a certain route, it becomes charged with the duty to afford necessary transportation facilities over this route, not by virtue of its charter alone, but because it has held

itself out as a common carrier over this route to the public and to the adjoining communities (see *Gasser case, supra*).

Such a railroad company has by virtue of the very use it has devoted its property to (in such case its terminals, rails, ties, etc.) become a common carrier as to this route and the communities bordering it.

Now, upon what basis of reasoning or sound principle can it be said that a carrier by railroad, as, for instance, the Michigan Central Company over its Jackson to Grand Rapids branch, is any the more a common carrier with any greater duties than the defendant in this case over its Detroit to Mackinac Route, where—

Defendant has maintained a regular schedule almost to the hour of four regular trips a week for thirty years between the different ports on this route, and

With its boats stopping at the same towns—almost at the same docks—which it has owned and maintained for thirty years;

And keeping up its regular through service and connections with different railroads at the different terminals on this route.

The District Court in its opinion in this case said:

“It is true that common carriers like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will, the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises and privileges, including certain attributes of sovereignty itself, as, for example, the power of eminent domain. * * *

The reasons however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges, other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain."

And Judge Knappen in his opinion, said:

"So far as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as eminent domain, as applied either to lines of travel (unnecessary upon the open seas) or to the acquisition of dock and wharf facilities."

This very contention was raised by counsel for the transportation company in the case of *Central Transportation Company v. Pullman Company*, 139 U. S., 24, 50, and very distinctly and emphatically disapproved by this court.

For counsel for the transportation company (quoting from page 29 of Volume 139 of the Supreme Court Reports) argued to this court that:

"This case differs from *Thomas v. Railroad Company*, 101 U. S., 71; *Pennsylvania Railroad Co. v. St. Louis, Alton, Etc. Railroad Co.*, 118 U. S., 290, 307; and *Oregon Railway Co. v. Oregonian Railway Co.*, 130 U. S., 1, in that no privilege was conferred upon the Central Transportation Company, which required the performance of some duty as an equivalent. It never became a trustee for the public

to discharge a duty because of a privilege conferred. It was vested with a franchise to be a corporation, to use a seal, and to act without its members becoming individually liable, saving to a certain extent, for its debts. It was permitted to do nothing which could not be done by an individual. Its sole power was to manufacture cars under specified patents. It was in precisely the same position as that of a limited liability company, which is only permitted to do what may be done by individuals; which is not a corporation; but which, under the laws of Pennsylvania may use a common seal, and may act without its members being liable for its debts. * * * A railroad corporation, however, is only authorized to locate a road between certain termini. After it has located the same, its power further to locate is at an end. Its right-of-way, therefore, becomes absolutely necessary to the continuance of its railroad. There is, therefore, a very obvious reason for requiring that such property so necessary to the exercise of the *quasi* public franchise, shall not be disposed of. There is no such reason in the case of a manufacturing corporation, which may build or buy, as many mills as it may see fit.

The Central Transportation Company, though called a 'transportation company,' was, as we have said, a manufacturing corporation, with no right to transport, saving as the same resulted from its right to use the cars which it might manufacture. In selling or leasing such cars it exercised a right of ownership incidental to its right to manufacture, as much as was that to transport, and it violated no duty to the public such as it would have owed to it if it had acquired property under the right of eminent domain, or had been vested with a power to do some act for the public benefit, by legislative grant, which it was not competent for individuals to perform. * * * It is not open to any person other than the Commonwealth, to complain that a private corpora-

tion deserves a writ of ouster because of its non-exercise of its franchises. Of course, the case is different with a *quasi* public corporation; for there the public have a right to demand that the property which it has acquired under the right of eminent domain, shall be used for the benefit of those whose rights alone justified its grant. This right the court will make efficacious whenever a person in interest asks it so to do.

The distinction between *quasi* public and ordinary trading corporations, is one that is much more than hinted at in *Thomas v. Railroad Company, supra*, and is very clearly stated in the text books, and in many of the cases."

These contentions this court overruled in their entirety in the following language:

"The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil Co.*, 66 Penn. St., 375; *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and *was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers owes to the public, independently of possessing any right of eminent domain*. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards

the validity of any attempt on its part to absolve itself from the performance of those duties to the public the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Pullman Southern Car Co.*, 117 U. S., 34; *York & Maryland Railroad v. Winans*, 17 How., 30, 39; *Railroad Co. v. Lockwood*, 17 Wall., 357; *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S., 397."

It therefore appears that the Pullman Car Company was held to the duties of a common carrier and required to furnish all necessary transportation facilities, *even though it did not have the right of eminent domain and other privileges usually enjoyed by a railroad company and even though it had no well defined route or right-of-way of its own.*

Moreover, its charter was what the defendant in the case at bar has referred to as permissive. The Pullman Company's charter in no way undertook to define or mark out the particular routes over which its cars were to run. Its charter simply gave it the right to engage in the "transportation of passengers in railroad cars," etc.

In this case, the defendant navigation company's charter gives it the right to engage in "the business of maritime commerce or navigation."

But a permissive charter, so-called, does not excuse full performance by a carrier of its duties to the public.

For instance, in *International Bridge Company v. New York*, 254 U. S., 126, it was held that a corporation, which had constructed a bridge over the Niagara River for railroad uses only, and whose charter permitted it to construct a bridge for foot and carriage uses also, could not complain of an act of the state of New York compelling it to construct the foot and carriage way.

We submit that it has long been considered that the very privilege of engaging in business as a common carrier places upon such persons as devote their property to that use the duty to properly perform such service.

Munn v. Illinois, 94 U. S., 113, 126.

The defendant regularly files its tariffs with the Interstate Commerce Commission and upon their approval, is granted, of course, the right to collect such freight and passenger rates from the general public.

The defendant has grown rich and powerful from the exercise of the privilege and right of carrying passengers and freight for hire.

Moreover, defendant Navigation Company enjoys a great privilege granted it by the state, namely, practical immunity from all taxation on its very valuable steamers.

Act No. 70 of the Public Acts of 1911 of Michigan provides that an owner of steam vessels "*engaged in the carrying of passengers * * * and freight * * * and employed in the navigation * * * of the Great Lakes*," may pay into the state treasury twenty cents per ton net on the registered tonnage of his boats, and thereby such owner's vessels are exempt from all other taxation, either state, county or municipal.

This valuable privilege the defendant company receives the benefit of and pays into the state treasurer's office at Lansing on its vessels the following tonnage taxes:

Boat	Tonnage	Tax
City of Detroit III	3328	\$665.60
City of Cleveland III	2403	480.60
Eastern States	1566	313.20
Western States	1566	313.20
City of Detroit II	1454	290.80
City of St. Ignace	1324	264.80
City of Alpena II	1282	256.40
City of Mackinac II	1277	255.40

It is readily apparent, therefore, that the state of Michigan grants to this company practical immunity from taxation on its three million dollars or more of vessels in return for its engaging in the business of carrying passengers and freight on the Great Lakes.

Under this act the defendant only has to pay annually in taxes on its vessels the sum of \$2,840.

If it were not for this valuable privilege granted by the state to this defendant, these vessels would be taxed as personal property at the city of Detroit, and being worth upwards of \$3,000,000.00 and the city and state and county tax rate at Detroit being \$25.00 a thousand approximately, the defendant company would pay annually in taxes at least \$75,000.

And it is significant that the company's steamers, City of Alpena II and City of Mackinac II, which are worth at least \$250,000.00 apiece and would therefore, otherwise pay a tax of about \$12,500 a year, now escape taxation except this tonnage tax amounting to \$511.80 on both vessels. And \$12,000.00 was saved in taxes in this way on these two boats during the year 1921 although defendant did not use them as common carriers, but kept them tied to the docks in Detroit and left the communities and public along Lake Huron to suffer the consequences.

*POINT VII.***The Public Importance and Necessity For This Service Cannot Be Doubted.**

The cities of Alpena and Cheboygan filed their brief with the Court of Appeals, stating in part that:

"Commencing in February, 1921, various articles in the public press announced that the Detroit & Cleveland Navigation Company would discontinue its usual service of over thirty years on its well known Detroit to Mackinac Route until such time as Congress should pass certain amendments to the 'Seaman's Act.' "

The Navigation Company had regularly operated its steamers City of Alpena II and City of Mackinac II, from Detroit to Mackinac Island and St. Ignace and touching at Alpena, Cheboygan, Harbor Beach and other ports. The actual discontinuance of this service by defendant during the season of 1921 was wholly without the consent of these communities—which depended thereon—and without any permission or approval of the state.

Defendant's action was as arbitrary as it was abrupt.

And no effort whatever was made by the Navigation Company to provide any other service to take the place of this necessary and vital transportation facility, a service which this whole lake territory had received for over thirty years and upon which it relied almost entirely for its interport transportation necessities on Lake Huron and connecting waters.

Defendant's steamers were each year used by great numbers of the residents of these various lake ports as well as tens of thousands of summer tourists from other states. Great quantities of manufactured goods and perishable foods and farm products of these ports and the territory and communities surrounding them were daily shipped to the different cities reached by defendant's steamers.

The discontinuance of this valuable transportation service to the various ports of Lake Huron by the defendant during the season of 1921 had a very serious effect upon their business conditions and prosperity generally. Considerable financial loss will naturally result to numerous merchants hotel keepers and others, who have in the past built up a good business in these different ports by reason of the large tourists' trade coming in on the steamers of the defendant.

It is estimated that the refusal of defendant to run its steamers as usual to Mackinac Island in 1921 kept at least twenty thousand persons from visiting this famous resort during the summer of 1921.

The Arnold Transportation Company publicly announced that it had been compelled to discontinue its daily service by its large steamer Chippewa from Mackinac Island to Sault Ste. Marie, because of the action of defendant company in taking its steamers off the Mackinac route.

Such discontinuance of service by defendant in the future will materially retard for years the growth and prosperity of many of these ports.

And to all this—what assurance does defendant hold out to these ports and communities for the future?

Defendant company in its brief, page 16, says:

* * * "What it has done *in no sense disables* it to transport passengers and freight upon the Great

Lakes or even upon its Mackinac division, if circumstances warrant. The bill shows that it still has all its vessels, and is engaged on other routes in performing its duties as a common carrier. * * * The fact that the Central Company, which did not possess any power of eminent domain, was under its charter conducting a business 'affected with a public interest,' was held to render it impossible for it to recover on a contract which totally disabled it from carrying out the business for which it was chartered. *No such case is here presented.*"

"If circumstances warrant" says this defendant.

To which we agree—but with this reservation—that the circumstances shall be those recognized by the law—not defendant's whim or hidden, ulterior motive."

POINT VIII.

The Lower Courts' Opinions and Conclusion of Brief.

To summarize:

If—and the District Court so held—a *common carrier by railroad could not at common law abandon its service arbitrarily.*

And if—and the District Court so held—such provisions as are contained in the Interstate Commerce Act and the Michigan Statute are merely "declaratory of the common law," and

Since the Interstate Commerce Act and the Michigan Statute apply to and define the duties of railroads and car-

riers partly by water and partly by railroad (of which respondent is one—see the *Goodrich Transportation case*, 224 U. S., 194) to be the same in this regard.

It follows logically that a carrier by water, such as defendant should be compelled to render the same service and is under the same duties as a carrier by railroad at common law.

And why not pray? If a carrier by water does not enjoy the right of eminent domain, it is solely because by the very nature of its transportation facilities it does not need this power. On the other hand, a number of expenses and charges which a carrier by railroad must meet, a carrier by water escapes.

And again we urge that entirely aside from the direct requirements of the acts of Congress and the Michigan Statute (Act 300 P. A. of 1909 of Michigan, as amended) the mere fact that a carrier has what is termed a permissive charter, does not relieve it of the usual obligations and duties of a carrier to the public.

In *Olcott v. Supervisors*, 16 Wallace (U. S.), 678, at page 695, this court used this language:

“Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, *but they are compellable to permit the public to use their works in*

the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

The concluding paragraph of Judge Knappen's opinion (which was filed some *seven* months after the case was submitted) is worthy of note.

He said:

"It is a matter of public information that the Michigan Public Utilities Commission has held that it has jurisdiction over some features, at least, of applications to compel resumption of service on the line in question. It scarcely need be said that the existence of such power in the commission confers no authority upon the courts to furnish the relief asked by the bill in this cause."

The city of Harbor Beach had previously filed its petition with the Public Utilities Commission of Michigan asking that the defendant Navigation Company be compelled to restore this necessary service.

The defendant answered and has denied the power, jurisdiction and authority of the commission in the premises, again claiming that it is a carrier by water and as such has, in effect, no duties or obligations to the public and its customers of a lifetime.

In the meanwhile the defendant plays fast and loose with the Lake Huron communities and cities and the traveling public.

Its position and attitude is summed up in its brief filed in the Court of Appeals in which it said:

* * * "What it has done *in no sense disables* it

to transport passengers and freight upon the Great Lakes or even upon its Mackinac division, if circumstances warrant. The bill shows that it still has all its vessels, and is engaged on other routes in performing its duties as a common carrier." * * *

And thus the public necessities and interests involved must await the mere whim and caprice of this public servant.

No new company cares to attempt the expense of acquiring vessels and dockage rights with which to serve these communities—and then be put out of business by the overwhelming competition which the defendant company might at any time cause by a resumption of its regular route and business.

In the meanwhile it denies the power of any tribunal or authority to compel it to serve the public—and refuses to state whether it will itself in the future supply the much needed service or not.

The result to the public is obvious.

And in a broader sense the country at large is vitally interested in the questions at issue. The railroads of the country are suffering from different forms of just such competition—which seems to take to itself in a variety of ways—as by vessel, electric suburban car, country freight and passenger bus lines, jitneys and the like—the privilege of absorbing all business deemed profitable for the time being and of escaping all the onerous duties and obligations (that they can) of common carriers generally.

In conclusion, it is submitted that substantially every principal involved here is ruled by the following decisions of this court.

Central Transportation Company v. Pullman Company, supra.

Interstate Commerce Commission v. Transit Company, supra.

Chesapeake & Ohio Railway v. Commission, supra.

It is further submitted that under the *Interstate Commerce case, supra*, the defendant company is a carrier subject to the duties and liabilities imposed by the Interstate Commerce Acts of Congress, and is obviously, under the same duty to the public as a carrier by railroad at common law.

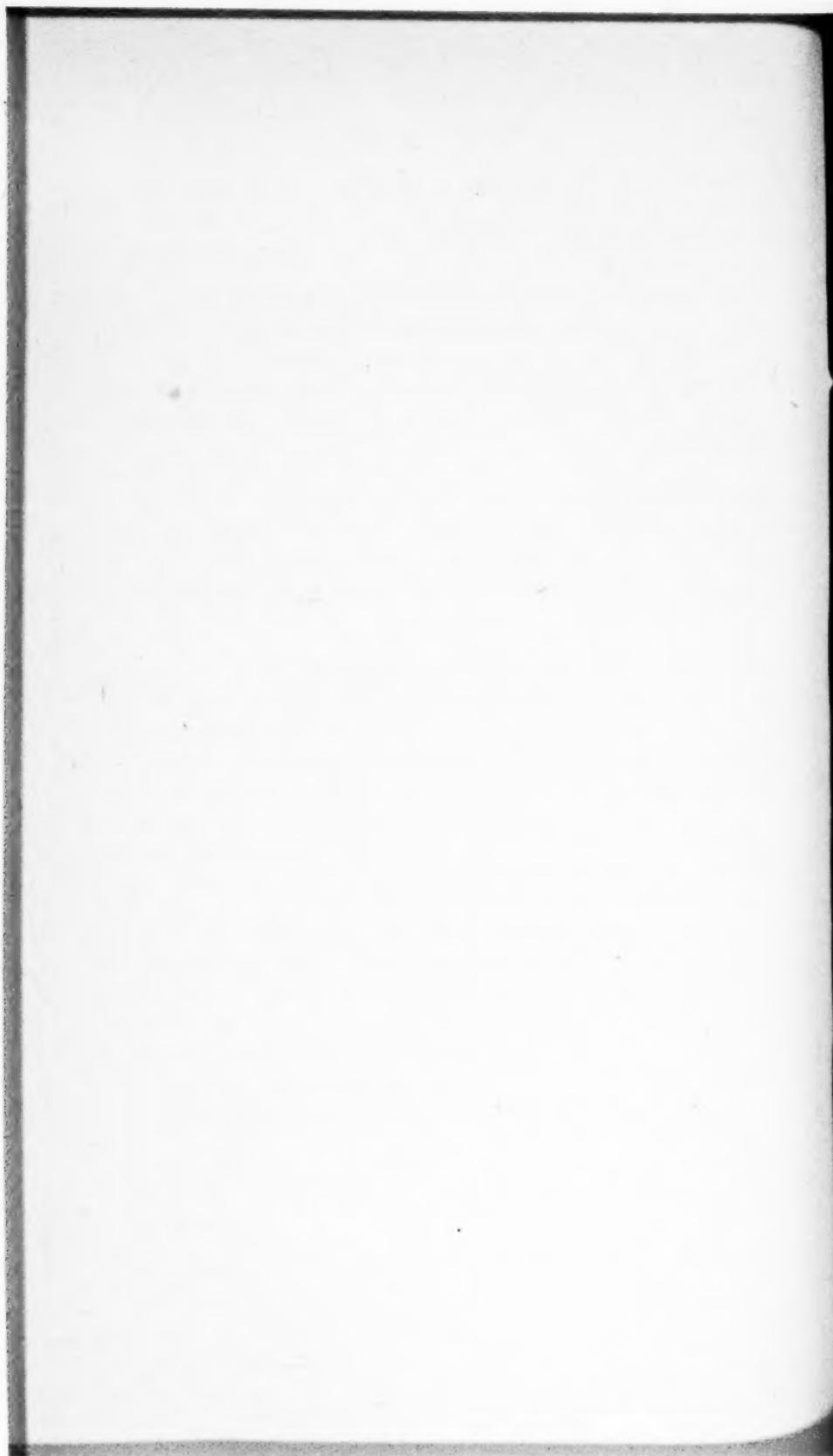
That under the *Pullman Car Company case, supra*, the defendant cannot excuse itself from full performance of its public duties by reason of the fact that it has no right of eminent domain and does not operate its transportation vehicles over rails.

That under the *Chesapeake & Ohio Railway case, supra*, it is of no importance that the defendant company takes the position that it will not operate at all a branch line—for in this case the railway company was compelled to give passenger service where it had never done so before.

And this court in the last mentioned case lays down the rule which we believe should be applied here, namely, that the lower court be directed to take the proofs upon final hearing and determine the nature and extent of defendant's business on its Mackinac Route, its productiveness, the character of service required, and the public need for it.

Respectfully submitted

WILLIAM LUCKING,
Plaintiff and Appellant.



IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LUCKING,

Petitioner,

vs.
DETROIT AND CLEVELAND NAVI-
GATION COMPANY,

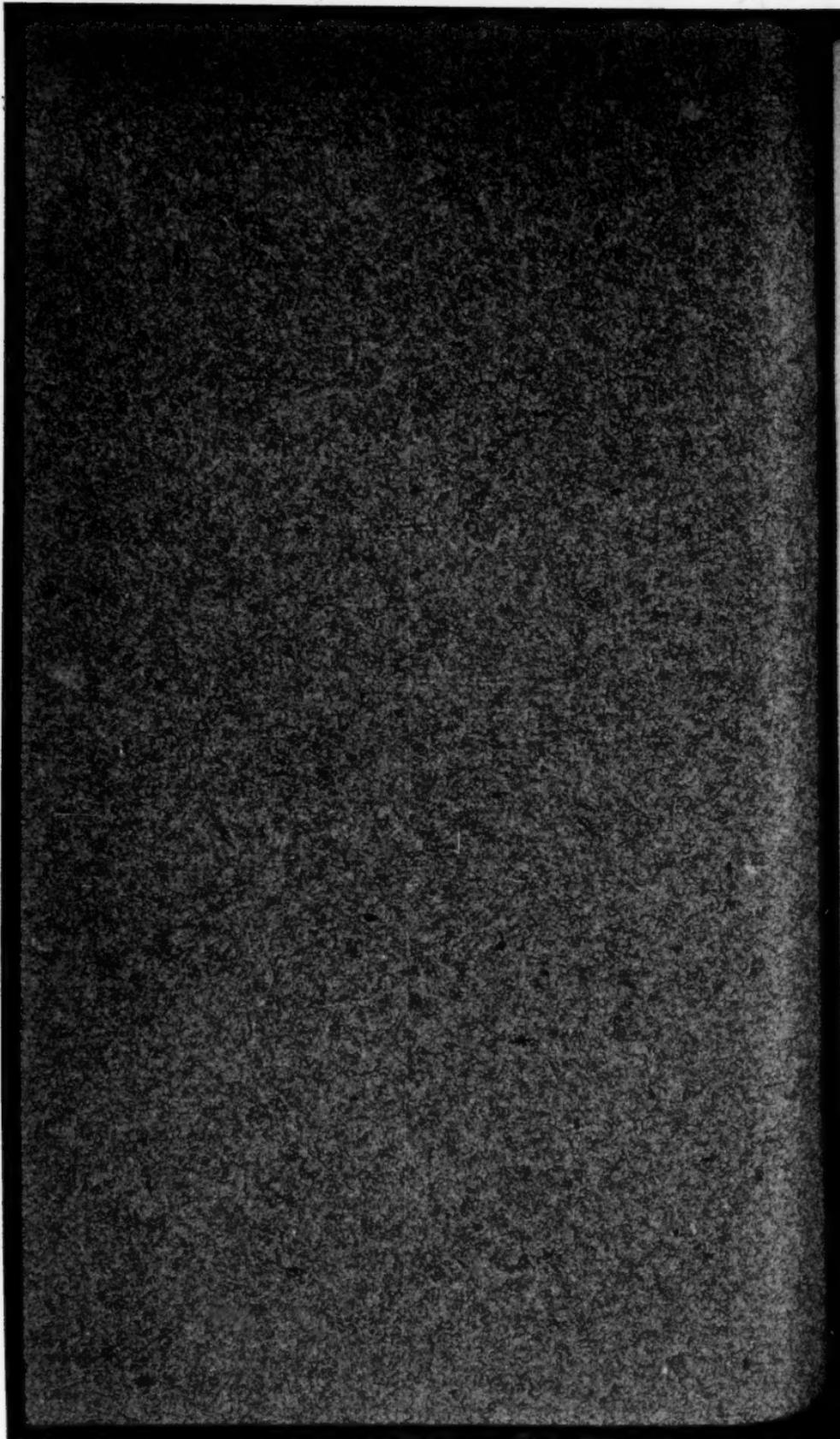
Respondent.

No. ~~21~~ 212

PETITION AND BRIEF OF WILLIAM LUCKING
FOR A WRIT OF CERTIORARI TO THE CIR-
CUT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

WILLIAM LUCKING,
For the Petitioner.

CONWAY BRIEF COMPANY
DETROIT, MICH.



IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LUCKING,

Petitioner,

vs.

**DETROIT AND CLEVELAND NAVI-
GATION COMPANY,**

Respondent.

**PETITION OF WILLIAM LUCKING FOR A WRIT
OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

To the Honorable the Justices of the Supreme Court
of the United States:

Petitioner respectfully prays for a Writ of Certiorari
to review the final decree of the United States Circuit
Court of Appeals for the Sixth Circuit, which affirmed
the decree of the District Court of the United States for
the Eastern District of Michigan in favor of the Detroit
and Cleveland Navigation Company, hereinafter referred
to as Respondent.

The Lower Court dismissed petitioner's bill of complaint filed to enjoin respondent from discontinuing its boat service of thirty years' standing over its well known Detroit to Mackinac Island Route.

Respondent, by its motion to dismiss, admits that it has the facilities with which to perform this service—that it is a common carrier—that this service is necessary to the public and the different ports on Lake Huron—and that it performs this service at a profit.

Respondent, however, took the position, in effect, in the Lower Courts that, being a carrier by water, it owed no duty to the public whatever—and could, in a word, operate its vessels over a given water route for thirty years, performing regularly a necessary transportation service for whole towns and communities and then suddenly abandon this route.

Respondent's regular steamers, City of Alpena II and City of Mackinaw II, were tied to the docks in Detroit and this territory has been without this necessary transportation service since.

The District Court sustained respondent in its contention, (see Opinion 273 Fed. 577) and petitioner appealed to the Court of Appeals for the Sixth Circuit, which affirmed the decree of the District Court. For its opinion see 284 Fed. 497.

THE FACTS

The averments of the Bill being taken as true on a motion to dismiss, it is therefore admitted:

That the respondent is a common carrier for hire and engaged in both interstate and intrastate transportation of passengers and property on the Great Lakes.

That it has carried on such business for thirty years or more over well known and defined routes between Detroit and Buffalo, Detroit and Cleveland, and Toledo Ohio and Detroit Michigan to Mackinac Island and St. Ingace. (Bill of Complaint Par. 3).

That it is a common carrier, partly by railroad and partly by water, being engaged in the continuous interstate transportation of freight and passengers from points on different railroads to and from points on its routes.

That respondent intends to and will carry on its general business as a common carrier during the season of 1921 and thereafter and will derive a large profit from such business. (Par. 4, 5).

That its Detroit to Mackinac Island Route is one of the most popular and largely traveled routes on the Great Lakes. That it has maintained for years over this route a regular four trip per week service by its steamers, Alpena II and Mackinac II, and has carried over this route tens of thousands of passengers and hundreds of thousands of tons of freight. (Par. 6).

That respondent has made large profits on its capital invested in this business and has availed itself of the many costly harbor improvements maintained by the United States.

That in 1919 its profits on its business equalled 25% after all Federal and other taxes had been paid.

That respondent has made a large net profit in the past on its business over its Detroit to Mackinac Route, (Par. 7).

That many of the ports and cities of Lake Huron were developed and built up in part by, and depend upon this transportation service of respondent, and that large amounts of the products of these ports and cities on Lake Huron are carried regularly on its steamers. (Par. 8).

That petitioner has been a passenger and shipper of goods in the past and intends to use said boats in the future. (Par. 9).

That respondent is discontinuing said Detroit to Mackinac service because of dissatisfaction with the Seamen's Act and intends to abandon this route and leave the territory served by its steamers without such transportation facilities (Par. 10).

That the Bill of Complaint is filed on behalf of all other persons who may desire to intervene. (Par. 14).

The prayer of the Bill is that the respondent be compelled by this Court to operate its steamers Alpena II

and Mackinaw II on said Detroit to Mackinac Route as has been its custom and usage in the past, and with rates and charges upon a reasonable and fair basis.

Upon the hearing on Appeal, the cities of Alpena, Harbor Beach and Cheboygan obtained permission to appear and be heard on briefs in support of the bill of complaint.

It is to be noted that no service is asked of this respondent which it has not given for the last twenty or thirty years to this territory.

That no request is made for additional facilities or expenditures of money for additional boats or equipment of any kind.

The Lower Court was asked to compel respondent to operate its steamers as usual and to not permit it to arbitrarily and without reason deprive this territory of the transportation facilities upon which it depends and upon which it was built up in the past.

And the bill avers that respondent could perform this service and does perform it at a profit, and that its entire business brings it in a large and handsome return on its investment.

QUESTIONS PRESENTED

The case presents a question of great public importance, involving as it does the right of the general public to have maintained a necessary and very important carrier service by water.

It involves the question whether obligations and duties held by this Court applicable to common carriers generally, are to be applied to common carriers by water or whether such carriers are in a class by themselves and thus relieved from performance of the usual duties of a carrier to the public.

The petitioner and the intervening cities on Lake Huron, contended that since the respondent had for over thirty years operated its vessels over a well established route upon Lake Huron and under regular schedules

And since by such regular service communities had been built up and a public necessity for such service created

And since respondent's general business returned it a handsome profit which it continued to derive from its regular routes upon Lake Erie from Detroit to Cleveland and Detroit to Buffalo, that respondent could not arbitrarily abandon its established route from Detroit to Mackinac Island and all service thereon which was necessary to the public and for which it had adequate facilities.

It is submitted that the question presented is one of vital importance to the public, not only of Michigan and surrounding territory, but also of the Country at large.

It presents to this Court the question whether common carriers by water are to be held to the same duties and obligations as those pertaining to other common carriers, such as railroads. A determination of the case involves consideration of three questions, namely:

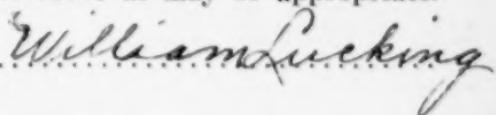
(1st) Whether Respondent is within the terms of the Interstate Commerce Act and Amendments and what if any duties to serve the public are imposed upon it thereby.

(2nd) Whether Respondent is under any duty at common law to maintain a necessary service over an established route.

(3rd) Whether Respondent is under such duty by virtue of any of the statutes of the State of Michigan.

Although petitioner has appealed to this Court from the decree of the Circuit Court of Appeals, which appeal has been allowed and a transcript duly filed, this petition for certiorari is also submitted.

Wherefore, petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court and directed to the Circuit Court of Appeals of the United States for the Sixth Circuit in order that its decree may be reviewed by this Court as provided by law, and that petitioner have such other relief as may be appropriate.

A handwritten signature in cursive ink, appearing to read "William L. Cushing".

STATE OF MICHIGAN—County of Wayne, ss.

WILLIAM LUCKING being duly sworn deposes and says that he is counsel for the petitioner in the above cause, that he knows the contents of said petition and that the facts therein stated are true to the best of his knowledge and belief.

William Lucking

Subscribed and sworn to before me this 2.. day of February, 1923.

LeRoy Colyon.....(Seal)

Notary Public, Wayne County Mich.

My commission expires *6/20/1925.....*

I certify that I have examined and read the foregoing petition for Certiorari and that in my judgment the petition is well founded and should be granted by this Honorable Court and that said petition is not filed for delay.

William Lucking

Dated February 2. 1923.

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LUCKING,

Petitioner,

vs.

DETROIT AND CLEVELAND NAVI-
GATION COMPANY,

Respondent.

BRIEF FOR PETITIONER

POINT I.

This Court may grant Petitioner full relief—Whether Petitioner's right thereto is based upon the provisions of the Interstate Commerce Act or upon the common law right to compel a carrier to perform its duties, or upon a statute of Michigan.

Greene vs. Railroad Company, 244 U. S. 499,

Siler vs. Louisville & R. R. Co. 213 U. S. 175
191,

Ohio Tax Cases, 232 U. S. 576, 586.

POINT II.

A common carrier by water is charged with the same obligations and duties as any other carrier.

The Maggie Hammond, 9 Wall. 435, 460,

The Lady Pike, 21 Wall. 1, 14,

The Niagara vs. Cordes, 21 How. 7, 23,

Central Transportation Co. vs. Pullman Co.,
139 U. S. 24, 50,

Citizens Bank vs. Nantucket Steamboat Co., 2
Story 16, Federal Cases No. 2730.

POINT III.

The Respondent is a common carrier, partly by railroad and partly by water, within the meaning of the Interstate Commerce Act, and is as specifically within the terms of that Act as any other carrier named therein.

*Interstate Commerce Commission vs. Goodrich,
Transit Company*, 224 U. S. 194, 207.

In *Interstate Commerce Commission vs. Goodrich
Transit Company*, *supra*, Mr. Justice White in delivering the opinion of this Court said:

“The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. It

is conceded that the carriers filing the bills in those cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier, named therein."

It is of interest that in the *Goodrich Case supra*, counsel's contention that vessel companies were not subject to the act for any purpose (See pages 199 and 202) was disposed of by this Court at bottom of page 207 of its opinion.

The provisions of the Interstate Commerce Act apply to many different kinds of common carriers.

Pipe Line Companies are within the Act.

The Pipe Line Cases, 234 U. S. 548.

Telephone and Telegraph Companies are within the Act.

Sterns vs. Telephone Co. 240 Fed. 759.

To Terminal Companies, even though they are wholly within one state.

United States vs. Union Stockyard, 226 U. S. 286,

Penn. Co. vs. United States, 236 U. S. 351.

To Steamship Companies, which participate in continuous shipment of freight by arrangements with railroads.

Interstate Commerce Commission vs. Transit Company, supra,

Alaska Steamship Co. vs. Ass'n., 236 Fed. 964.

POINT IV.

That the Respondent Steamship Company is clearly within the terms of the Interstate Commerce Act is shown by the different amendments to the Act.

The present act provides:

“(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * * *

(3) * * * Wherever the word ‘carrier’ is used in this Act it shall be held to mean ‘common carriers’ * * * the term ‘transportation’ as used in this Act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage.”

Interstate Commerce Act as amended by the Act of February 28, 1920.

Section 3, *supra*, was amended recently so as to include the term "vessels."

The word "transportation" is of importance in construing the Act.

Penn. Co. vs. U. S. 236 U. S. 351, 363.

Section 4 of the Interstate Commerce Act provides that:

"* * * (4) It shall be the duty of every common carrier subject to this Act engaged in the *transportation of passengers or other property* to provide and furnish such *transportation upon reasonable request therefor*."

These provisions of the Act apply to a coast wise steamship company or lake carrier within the United States and compel it to furnish adequate facilities for transportation of passengers and freight.

Alaska Steamship Company vs. Longshoremen's Association, 236 Fed. 964, 971.

The Interstate Commerce Act was originally directed entirely against practices of discrimination.

Act of February 4, 1887 (24 U. S. Stats. 379)

Then by amendment of June 29, 1906 a provision directing rendition of transportation service upon reasonable request was added—see

34 Stats. 584 Sec. 1 end of 2nd Paragraph.

This provision has been commented on by this Court in

Chicago Ry. vs. Elevator Co., 226 U. S. 426, 434.

Ellis vs. I. C. C. 237 U. S. 434, 443 (first syl).

Thereafter this provision was re-arranged as Subdivision 4 of Section 1 of this Act. See 41 Stat. 474, amendment of February 28, 1920.

The provisions of the Interstate Commerce Act do not apply, however, to ocean carriers transporting goods to foreign countries.

Pacific Steamship Co. vs. Railroad Co., 251 Fed. 218 (9 C. C. A.).

POINT V.

Common carriers are often compelled to operate branch lines where the public necessity therefor appears.

The bill avers that this necessary service can be rendered without loss and this, of course, is taken as true. It also avers that the respondent is making large returns on its capital and several times what is earned by an ordinary carrier by railroad.

But even though some slight loss was made on this Mackinac Route, since respondent admits that on all its business it makes a considerable profit, it has no legal right to abandon this service, for the public necessity therefor is also admitted.

Chesapeake & Ohio Railroad Co. vs. Commission, 242 U. S. 603, 607;

Atlantic Coast Line vs. Commission, 206 U. S. 1-24.

In *Chesapeake & Ohio Co. vs. Commission, supra*, an Order requiring the Railroad Company to run two passenger trains each day upon a branch on which no passenger service had ever been had, although such trains would be run at a loss, was sustained.

The Supreme Court in laying down the rule to be followed in all cases said:

"One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co. vs. North Carolina Corporation Commission*, 206 U. S. 1, 26; *Missouri Pacific Ry. Co. vs. Kansas*, 216 U. S. 262, 279; *Oregon Railroad & Navigation Co. vs. Fairchild*, 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co. vs. Wisconsin Railroad Commission*, 237 U. S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon

the service already being rendered are also to be considered. Cases *supra*. Applying these criteria to the order in question, we think it is not shown to be unreasonable."

And see:

Colorado Co. vs. Commission, 54 Colo. 64, 129 Pae. 506;

State vs. R. R. Co. 53 Kan. 377, 36 Pae. 747;

Southern Company vs. Franklin Co., 96 Va. 693, 32 S. E. 485;

People vs. Albany R. Co., 24 N. Y. 261;

Southern R. R. Co. vs Hatchett, 174 Ky. 463, L. R. A. 1917-D 1105;

Hocking Valley Co. vs. Commission, 92 Ohio St. 9 L. R. A. 1916-A 267.

Common carriers must operate branch lines, where public necessity requires, even though there is no statute or charter provision—the route having been laid out voluntarily by the carrier and the service given for a long period of years.

Gasser Case, 205 Mich. 5.

Grinsfelder vs. Spokane Ry. Co. 19 Wash. 518, 41 L. R. A. 515,

Hocking Valley Co. vs. Commission, 92 Ohio St. 9, L. R. A. 1918-A 267,

State vs. Bullock, 78 Fla. 82 So. 866.

This is not a case where the carriers' entire operations and service are at a loss and it seeks to surrender its franchises and go out of business.

Of course, under special circumstances a carrier may abandon operation, as in the cases of

Bullock vs. R. R. Commission, 254 U. S. 513, 521,

Iowa vs. Trust Co. 215 Fed. 307 (8 C. C. A.)

State vs. Jack, 145 Fed. 281 (4 C. C. A.)

But carriers by steamboat may not disregard the rights of the public.

Lee Steamers vs. Packet Co., 277 Fed. 5, 9 (6 C. C. A.)

No one can be compelled to engage in business as common carrier—but if they do, they become subject to the duties of common carrier—even though such duty is not imposed by Statute or Order of Commission.

Missouri Pacific Co. vs. Larabee Mills, 211 U. S. 612, 619.

Respondent having been incorporated as a common carrier by the State of Michigan—with power to own and hold property for that purpose—and

Having exercised its corporate powers and privileges to that end for a great number of years, and having operated its steamers over its Detroit to Mackinac Route for over thirty years, and

Now continuing to exercise its corporate franchises on its Detroit to Cleveland and Detroit to Buffalo Routes, we submit:

It cannot arbitrarily abandon its customary service on the Mackinac Route and thus avoid its implied duty to the public, and for which there is a public necessity.

It is of no consequence that respondent's charter is what is sometimes referred to as "permissive" and does not contain express stipulations in so many words requiring operation of its steamers on this Mackinac Route.

Gasser vs. Garden Bay Railway Co., 205 Mich. 5, 19, 20;

Winona, etc. Railroad Company vs. Blake, 94 U. S. 180;

Munn vs. Illinois, 94 U. S. 113, 125, 126;

Bryan vs. L. & N. R. R. Co., 244 Fed. 650, 654 (8 C. C. A.).

In *Gasser vs Railroad Company, supra*, it was held by the Supreme Court of Michigan that a railroad company, having been incorporated as a common carrier, and having entered upon the operation of its line under the implied duty to the public to continue its operation as a public service corporation, could not thereafter arbitrarily abandon operations, permanently discontinue the assumed service, and dismantle the road without the consent of the state through its constituted authority.

POINT VI.

That Respondent enjoyed no right of eminent domain from the State of Michigan, does not relieve it from its duty to afford the public an admittedly necessary transportation service.

The District Court in its opinion in this Case said:

“It is true that common carriers like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will, the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises and privileges, including certain attributes of sovereignty itself, as, for example, the power of eminent domain. * * * * *

“The reasons however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges, other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain.”

This very contention was raised by counsel for the Transportation Company in the case of *Central Transportation Company vs. Pullman Company, supra*, and very distinctly and emphatically disapproved by this Court.

For Counsel for the Transportation Company (quoting from page 29 of Volume 139 of the Supreme Court Reports) argued to this Court that:

"This case differs from *Thomas vs. Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad Co. vs. St. Louis, Alton, etc. Railroad Co.*, 118 U. S. 290 307; and *Oregon Railway Co. vs. Oregonian Railway Co.*, 130 U. S. 1, in that no privilege was conferred upon the Central Transportation Company, which required the performance of some duty as an equivalent. It never became a trustee for the public to discharge a duty because of a privilege conferred. It was vested with a franchise to be a corporation, to use a seal, and to act without its members becoming individually liable, saving to a certain extent, for its debts. It was permitted to do nothing which could not be done by an individual. Its sole power was to manufacture cars under specified patents. It was in precisely the same position as that of a limited liability company, which is only permitted to do what may be done by individuals; which is not a corporation; but which, under the laws of Pennsylvania may use a common seal, and may act without its members being liable for its debts. * * * * A railroad corporation, however, is only authorized to locate a road between certain termini. After it has located the same, its power further to locate is at an end. Its right of way, therefore, becomes absolutely necessary to the continuance of its railroad. There is, therefore,

a very obvious reason for requiring that such property so necessary to the exercise of the quasi public franchise, shall not be disposed of. There is no such reason in the case of a manufacturing corporation, which may build or buy, as many mills as it may see fit.

The Central Transportation Company, though called a "transportation company", was, as we have said, a manufacturing corporation, with no right to transport, saving as the same resulted from its right to use the cars which it might manufacture. In selling or leasing such cars it exercised a right of ownership incidental to its right to manufacture, as much as was that to transport, and it violated no duty to the public such as it would have owed to it if it had acquired property under the right of eminent domain, or had been vested with a power to do some act for the public benefit, by legislative grant, which it was not competent for individuals to perform. * * * * It is not open to any person other than the Commonwealth, to complain that a private corporation deserves a writ of ouster because of its non-exercise of its franchises. Of course, the case is different with a quasi public corporation; for there the public have a right to demand that the property which it has acquired under the right of eminent domain, shall be used for the benefit of those whose rights alone justified its grant. This right the court will make efficacious whenever a person in interest asks it so to do.

The distinction between quasi public and ordinary trading corporations, is one that is much more than hinted at in *Thomas vs. Railroad Company, supra*, and is very clearly stated in the text books, and in many of the cases."

These contentions this Court overruled in their entirety in the following language:

"The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. vs. North American Oil Co.*, 66 Penn. St. 375; *Treadwell vs. Salisbury Manuf. Co.* 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and *was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers owes to the public, independently of possessing any right of eminent domain*. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the

performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard vs. Pullman Southern Car Co.*, 117 U. S. 34; *York & Maryland Railroad vs. Winans*, 17 How. 30, 39; *Railroad Co. vs. Lockwood*, 17 Wall, 357; *Liverpool & Great Western Steam Co. vs. Phenix Ins. Co.*, 129 U. S. 397."

Moreover, respondent Navigation Company enjoys a great privilege granted it by the state, namely, practical immunity from all taxation on its very valuable steamers.

CONCLUSION

To summarize:

If—and the District Court so held—a common carrier by railroad could not at common law abandon its service arbitrarily

And if—and the District Court so held—such provisions as are contained in the Interstate Commerce Act and the Michigan Statute are merely "declaratory of the common law", and

Since the Interstate Commerce Act and the Michigan Statute apply to and define the duties of railroads and carriers partly by water and partly by railroad (of which respondent is one—see the Goodrich Transportation case, 224 U. S. 194) to be the same in this regard.

It follows logically that a carrier by water, such as respondent is now compelled to render the same service and is under the same duties as a carrier by railroad at common law.

And why not pray? If a carrier by water does not enjoy the right of eminent domain, it is solely because by the very nature of its transportation facilities it does not need this power. On the other hand, a number of expenses and charges which a carrier by railroad must meet, a carrier by water escapes.

And again we urge that entirely aside from the direct requirements of the Acts of Congress and the Michigan Statute, (Act 300 P. A. of 1909 of Michigan, as amended) the mere fact that a carrier has what is termed a permissive charter, does not relieve it of all obligations and duties to the public.

Wyman on Public Service Corporations, Volume 1 Sections 305 and 306.

In *Olcott vs. Supervisors*, 16 Wallace (U. S.) 678, at page 695, this Court used this language:

“Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed in that of State. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made

by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, *but they are compellable to permit the public to use their works* in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

In Conclusion, it is submitted that substantially every principle involved here is ruled by the following decisions of this Court.

Central Transportation Company vs. Pullman Company, supra,

Interstate Commerce Commission vs. Transit Company, supra,

Chesapeake & Ohio Railway vs. Commission supra.

It is further submitted that under the Interstate Commerce case, *supra*, the defendant company is a carrier subject to the duties and liabilities imposed by the Interstate Commerce Acts of Congress, and is obviously, under the same duty to the public as a carrier by railroad at common law.

That under the Pullman Car Company case, *supra*, the defendant cannot excuse itself from full performance of its public duties by reason of the fact that it has no right of eminent domain and does not operate its transportation vehicles over rails.

That under the Chesapeake & Ohio Railway case, *supra*, it is of no importance that the defendant company takes the position that it will not operate at all a branch line—for in this case the Railway Company was compelled to give passenger service where it had never done so before.

And this Court in the last mentioned case lays down the rule which we believe should be applied here, namely, that the Lower Court be directed to take the proofs upon final hearing and determine the nature and extent of respondent's business on its Mackinac Route, its productiveness, the character of service required, and the public need for it.

Respectfully submitted,

William Lucking,
Petitioner.

A
J
C
J